(1) Supreme Court, U.S.
FILED

992075 JUN 26 2000

OFFICE OF THE CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES

STEVEN EUGENE PASSMORE, Petitioner
v.
UNITED STATES OF AMERICA, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Ellis Stuart Rubin, Esq.
COUNSEL OF RECORD
Rubin & Rubin, P.A.
333 Northeast 23rd Street
Miami, Florida 33137
(305) 576-5600 Direct Line

Terry D. Bork, Esq.
Law Offices of Terry D. Bork
2107 Hendricks Avenue
Jacksonville, Florida 32207
(904) 3 59-0234 Direct Line
and
I. Mark Rubin, Esq.
Rubin & Rubin, P.A.
2107 Hendricks Avenue
Jacksonville, Florida 32207
(904) 396-7711 Direct Line
Counsel for Petitioner

June 2000

28 PP

QUESTIONS PRESENTED

I. Whether the United States Court of Appeals had jurisdiction under 18 U.S.C. § 3731 to hear the government's appeal of the United States District Court's finding that there was insufficient evidence to establish the existence of multiple conspiracies rather than one single conspiracy in order to avoid the defendant's double jeopardy defense?

II. Whether the government may avoid the double jeopardy clause by presenting evidence to show that there were multiple smaller conspiracies when that evidence contradicts the face of the indictments which charged a single large conspiracy?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 9

I. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DID NOT HAVE JURISDICTION TO HEAR THE GOVERNMENT'S APPEAL AS THE DISTRICT COURT'S FINDING THAT THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH THE EXISTENCE OF MULTIPLE CONSPIRACIES WAS AN ACQUITTAL UNDER THE DOUBLE JEOPARDY CLAUSE AND THUS THE GOVERNMENT'S APPEAL WAS BARRED BY THIS COURT'S OPINIONS

IN *BURKS V. UNITED STATES*, 437 U.S. 1 (1978) AND *UNITED STATES V. SCOTT*, 437 U.S. 82 (1978) 10

II. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ERRED IN HOLDING THAT THE GOVERNMENT CAN AVOID THE BAR OF THE DOUBLE JEOPARDY CLAUSE BY PRESENTING EVIDENCE THAT THERE WERE MULTIPLE SMALLER CONSPIRACIES WHEN THAT EVIDENCE CONTRADICTS THE FACE OF THE INDICTMENTS WHICH ONLY CHARGED A SINGLE LARGE CONSPIRACY AND THIS HOLDING IS CONTRARY TO THE DECISION OF THE FIFTH CIRCUIT IN *UNITED STATES V. ATKINS*, 834 F.2D 426 (5TH CIR. 1987), *OVERRULED ON OTHER GROUNDS*, 933 F.2D 325 (5TH CIR. 1991). 15

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Burks v.. United States, 437 U.S. 1 (1978) 10, 11, 12

Short v. United States, 91 F.2d 614, 624 (4th Cir. 1937).....19

Smalis v. Pennsylvania, 476 U.S. 140 (1986) 11

United States v. Atkins, 834 F.2d 426 (5th Cir. 1987), *overruled on other grounds*, 933 F.2d 325 (5th Cir. 1991).....*passim*

United States v. Broce, 781 F.2d 792, 799, 804 (11th Cir. 1986)(McKay, J., concurring) (Seymour, J., concurring in part and dissenting in part) 19

United States v. Gonzalez, 940 F.2d 1413 (11th Cir. 1991)..... 14-15

United States v. Passmore, No. 99-12325 (11th Cir. Feb 17, 2000).....*passim*

United States v. Scott, 437 U.S. 82 (1978).....11, 12, 14, 15

United States v. Stitzer, 785 F.2d 1506, 1518 (11th Cir. 1986).....15

Statutes

18 U.S.C. § 3731..... i, 2, 7, 11

21 U. S. C., § 841 .....4, 5

21 U. S. C. § 846.....4, 5, 16

28 U.S.C. § 1254(1) 2

Constitutional Provisions

U.S. CONST. amend V 2

IN THE SUPREME COURT OF THE UNITED STATES

STEVEN EUGENE PASSMORE, Petitioner
v.
UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner, Steven Eugene Passmore, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in the above-entitled proceeding on February 17, 2000.

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Eleventh Circuit was entered on February 17, 2000 and appears at App. 1-19. The unreported order of the United States Court of Appeals for the Eleventh Circuit denying a petition for rehearing was filed on March 28, 2000 and appears at App. 20-21.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on February 17, 2000. A timely petition for rehearing was denied on March 28, 2000. The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Eleventh Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution:

> No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; *nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;* nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation. (emphasis added).

18 U.S.C. § 3731:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court

dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

The provisions of this section shall be liberally construed to effectuate its purposes.

STATEMENT OF THE CASE

This case involves an appeal from an order granting Mr. Passmore's motion to dismiss based upon a finding that the prosecution of Mr. Passmore violated double jeopardy.

Mr. Passmore was indicted by a grand jury in the Northern District of Florida on February 22, 1996. (R1-1). (The Northern District case). Count I of the indictment read as follows:

> That from an unknown date, but at least by February 24, 1991, and continuing through the date of the return of this indictment, in the Northern District of Florida and elsewhere, the defendant, STEVEN EUGENE PASSMORE, did unlawfully combine, conspire, confederate, and agree, and have a tacit understanding with other persons, to knowingly and intentionally possess with the intent to distribute the controlled substances cocaine and cocaine base, also known as "crack cocaine," in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(A)(ii) and (iii).
>
> All in violation of Title 21, United States Code, Section 846.

(R1-1).

Mr. Passmore was also indicted by a federal grand jury in the Middle District of Florida. (The Middle District case). Count I of the superseding indictment in that case alleged the following:

> From in or about 1986, through in or about December 1997, at Jacksonville, in the Middle District of Florida, and elsewhere, STEVEN EUGENE PASSMORE...the defendant herein, did knowingly, willfully, and intentionally combine, conspire, confederate and agree with other persons known and unknown to distribute cocaine and cocaine base, commonly known as crack, both Schedule II substances, in violation of Title 21, United States Code, Section 841 (a)(1).
>
> ....
>
> All in violation of Title 21, United States Code, Section 846.

(R1-30 (Court Exh. No. 1), R3-6-7, 18).

At the close of the government's case, Mr. Passmore moved to dismiss the Northern District indictment on the grounds of double jeopardy. (R3-2). The basis for the double jeopardy motion was the fact that Mr. Passmore had plead guilty to an indictment in the Middle District that

encompassed the same conspiracy that was the subject matter of the Northern District indictment. (R3-5-17).

The government's response was that double jeopardy had not been violated because the evidence established that Mr. Passmore had been involved in two separate conspiracies with one conspiracy involving a group in Jacksonville and another conspiracy involving a group in Fort Walton Beach. (R3-20-21, 30-31).

The district court then analyzed the two indictments. In doing so, the court stated the following:

> [L]et's look at the two charges. I mean we've got two conspiracy charges that are extremely broad, even broader than the normal conspiracy charge, because each encompass the period of time ranging either from an unknown date, but at least 1991, or going back to 1986 up through—one of them goes up through February of '96, and the other one goes all the way up, apparently, to December of '97. And they both charge a conspiracy, not only of one substance, but two substances, cocaine and cocaine base. And they also don't identify any other co-conspirators, just say other persons known and unknown. And it also, in terms of the geographic area, they both say either the Middle District of Florida or the Northern District of Florida, and elsewhere, which

> essentially covers the rest of the world. So you superimpose these two and they're virtually the same.

(R3-28-29). As for the government's claim that there were two separate conspiracies with Mr. Passmore the source of supply for one group in Jacksonville and another group in Fort Walton Beach, the court found that "[the government] didn't charge that." (R3-19). The district court then granted Mr. Passmore's motion. (R3-40-43; R1-31-1).

The government then appealed this decision to the United States Court of Appeals for the Eleventh Circuit. (R1-32).

The Eleventh Circuit rendered its decision on February 17, 2000. *United States v. Passmore*, No. 99-12325 (11th Cir. Feb. 17, 2000); App. 1-19. In its opinion, the court first stated that it had jurisdiction to hear the government's appeal under 18 U.S.C. § 3731 because the district court's decision was not based upon a finding that there was insufficient evidence to convict Mr. Passmore. *Id.* at 11; App. 10-12. As for the district court's double jeopardy finding, the court stated that there were five factors to consider in determining whether there were single or multiple conspiracies. *Id.* at 15; App 14. These five factors were:

> (1) time, (2) persons acting as co-conspirators, (3) the statutory offenses charged in the indictments, (4) the overt acts charged by the government or any other description of the

> offense charged which indicates the nature and scope of the activity which the government sought to punish in each case, and (5) places where the events alleged as part of the conspiracy took place.

Id.; App. 14. The court held that the first and third factors weighed in Mr. Passmore's favor, but that the other factors did not. *Id.* at 15-18; App.14-17. Regarding the second factor, the court stated that:

> Because the broad language of "other persons known and unknown" is present in both indictments, some overlap is conceivable. This is not a case, however, where the double jeopardy motion was made prior to trial and we have limited information regarding what the evidence will show. At the time the motion to dismiss was made, the Government had concluded its evidence at trial. A review of the trial record from trial, and the materials submitted from the Middle District case, shows absolutely no evidence of any overlap in the individuals involved in the two cases other than Passmore.

Id. at 16; App. 15. As for the fourth factor, the Eleventh Circuit stated that:

> Neither indictment here charges any overt acts. And, although the descriptions of the

> acts taken in the cases show a similar pattern of activity, there is no evidence of any action by Passmore, or any co-conspirator, in one of the cases which can be said to have aided or been a part of the activity charged in the other case.

Id. at 17; App. 16. Turning to the final factor, the court stated that:

> Some overlap in location is conceivable under the broad allegations of the two indictments charging that Passmore conspired to distribute "in the Middle District of Florida and elsewhere" and "in the Northern District and elsewhere." Further, Passmore provided cocaine and cocaine base to co-conspirators in both cases in Atlanta and Jacksonville. The evidence shows, however; that the narcotics were intended to be, and were in fact, distributed in different markets.

Id. at 17-18; App. 16. In examining these five factors, the Eleventh Circuit went beyond the four corners of the indictments in question in making its decision.

The Eleventh Circuit then reversed the dismissal of the Northern District indictment. *Id.* at 20; App. 19.

REASONS FOR GRANTING THE WRIT

A grant of review by this Court is needed in order to settle two important questions of law. First, review by this Court will settle the question of whether the government can appeal a district court's factual finding that there was insufficient evidence to establish the existence of multiple conspiracies so as to avoid a defendant's double jeopardy defense. Second, review by this Court will also settle the question of whether the government can avoid a double jeopardy defense by presenting evidence to establish that there were multiple smaller conspiracies when that evidence contradicts the face of the indictments drafted by the government which only charged a single large conspiracy. The resolution of these two important questions of law will have a significant impact in any case involving the double jeopardy clause. Moreover, a decision on these two important issues will insure the uniformity of decisions in the courts and the uniformity of behavior among prosecutors in the drafting of indictments.

I. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DID NOT HAVE JURISDICTION TO HEAR THE GOVERNMENT'S APPEAL AS THE DISTRICT COURT'S FINDING THAT THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH THE EXISTENCE OF MULTIPLE CONSPIRACIES WAS AN ACQUITTAL UNDER THE DOUBLE JEOPARDY CLAUSE AND THUS THE GOVERNMENT'S APPEAL WAS BARRED BY THIS COURT'S OPINIONS IN *BURKS V. UNITED STATES*, 437 U.S. 1 (1978) AND

UNITED STATES V. SCOTT, 437 U.S. 82 (1978).

The United States Court of Appeals for the Eleventh Circuit did not have jurisdiction to hear this appeal as the district court's finding that there was insufficient factual evidence to demonstrate the existence of two separate conspiracies amounted to an acquittal which in turn barred the government's appeal. 18 U.S.C. § 3731 authorizes governmental appeals in criminal actions, but states that "no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution." The rule is settled that "[a] judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed...." *See United States v. Scott*, 437 U.S. 82, 91 (1978) (footnote omitted).[1]

The most important case in this regard is *Burks v. United States*, 437 U.S. 1 (1978). In *Burks*, the accused had

---

[1] The fact that the district court did not characterize its decision as an acquittal is not important. That is because this Court has declared that the label used by the trial court in characterizing its decision as an acquittal or a dismissal is not dispositive as "the trial judge's characterization of his own action cannot control the classification of the action." *Scott*, 437 U.S. at 96. *See also Smalis v. Pennsylvania*, 476 U.S. 140 (1986) (Pennsylvania Supreme Court's characterization of a defendant's demurrer as an election to seek a dismissal rather than an effort to seek a ruling as a matter of law that the state's evidence was insufficient factually to establish his guilt was not binding on the United States Supreme Court). Thus, the fact that the district court entered an order of dismissal rather than an order of acquittal is not dispositive.

been charged with armed robbery and he pled insanity. The appellate court concluded that the defendant's motion for an acquittal had been erroneously denied because the defendant had set forth a prima facie defense of insanity and the government had failed to rebut that defense beyond a reasonable doubt. *Id.* at 2-5. This Court held that since the appellate court had concluded that the evidence was insufficient to convict the defendant, he could not be retried on double jeopardy grounds. This Court held that there was a distinction between reversals due to trial error and reversals resulting from evidentiary insufficiency. *Id.* at 14-15. It stated that:

> In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct....
>
> The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer

> whatever proof it could assemble. (footnote omitted). Moreover, such an appellate reversal means that the government's case was so lacking that it should not have even been submitted to the jury. Since we necessarily afford absolute finality to a jury's verdict of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

Id. at 15-16.

The same reasoning applies in this case. The defendant here set forth a prima facie case that his prosecution was barred because there was only one single conspiracy rather than two separate conspiracies. The government then failed to present sufficient evidence to rebut the defendant's case or to prove that there were two separate conspiracies rather than one conspiracy. The district court explicitly found that the defendant had set forth a prima facie case and that the government had presented *insufficient evidence* to rebut his defense or to show that there were two separate conspiracies. The trial court's decision was not based upon some finding that there had been trial error or some fundamental defect in the judicial process. It was based upon a finding that there was *insufficient evidence* to establish that there was a single

conspiracy rather than two separate conspiracies and that therefore the double jeopardy clause barred the defendant's prosecution. (R3-28-41). In short, the trial court's decision was based upon a failure of proof by the government at trial. As such, the district court's decision was an acquittal that could not be appealed by the government.

The Eleventh Circuit's decision rejecting this argument was based upon an erroneous reading of another United States Supreme Court decision, *United States v. Scott*, 437 U.S. 82 (1978). In its opinion, the lower appellate court stated that *Scott* "[D]rew a distinction between cases in which there has been a finding on the issue of factual guilt or innocence and those cases in which the defendant sought to terminate the proceedings without submission to either a judge or jury as to factual guilt or innocence." *See Passmore*, No. 99-12325, at 11; App. 11. The Eleventh Circuit then stated that *Scott* had held that decisions on issues such as insanity or entrapment fell into the first category, but that decisions on issues such as pre-indictment delay fell into the latter category. *Id.* at 11-14; App. 11. The Eleventh Circuit then held that Mr. Passmore's double jeopardy claim fell into the latter category and thus was barred by *Scott*. *Id.*; App. 11.

The problem with the Eleventh Circuit's analysis of *Scott* is that it ignores the fact that the defendant's defense is based upon a factual issue that can be resolved by a jury. This is because the general rule is that the question of whether there is one conspiracy or several conspiracies is primarily a factual question for a jury to resolve. *See United*

States v. Gonzalez, 940 F.2d 1413 (11th Cir. 1991); *United States v. Stitzer*, 785 F.2d 1506, 1518 (11th Cir. 1986). As such, the district court's double jeopardy decision was similar to an insanity or entrapment decision rather than a pre-indictment delay decision. Decisions on issues such as pre-indictment delay are the type of issues that are not submitted to a jury for a factual finding. However, decisions on issues such as insanity, entrapment, or the existence of single or multiple conspiracies are the type of issues that can be submitted to a jury for a factual finding. Consequently, when the district court in this case found that there was *insufficient evidence* to submit the question of whether there was one conspiracy or several conspiracies to the jury for resolution, it was necessarily entering an acquittal for the defendant due to insufficient evidence. Accordingly, the government cannot appeal the district court's decision.

II. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ERRED IN HOLDING THAT THE GOVERNMENT CAN AVOID THE BAR OF THE DOUBLE JEOPARDY CLAUSE BY PRESENTING EVIDENCE THAT THERE WERE MULTIPLE SMALLER CONSPIRACIES WHEN THAT EVIDENCE CONTRADICTS THE FACE OF THE INDICTMENTS WHICH ONLY CHARGED A SINGLE LARGE CONSPIRACY AND THIS HOLDING IS CONTRARY TO THE DECISION OF THE FIFTH CIRCUIT IN *UNITED STATES V. ATKINS*, 834 F.2D 426

(5TH CIR. 1987), *OVERRULED ON OTHER GROUNDS*, 933 F.2D 325 (5TH CIR. 1991).

The United States Court of Appeals for the Eleventh Circuit erred in holding that the government can avoid a double jeopardy defense by presenting evidence that there were two separate conspiracies involved when the indictments at issue charged a single large conspiracy. Specifically, the language of the two indictments at issue here both *charged* a worldwide conspiracy to distribute cocaine and cocaine base in violation of 21 U.S.C. § 846. (R1-1, R1-30 (Court Exh. No. 1), R3-6-7, 18). Accordingly, when Mr. Passmore pled guilty to the worldwide conspiracy indictment in the Middle District of Florida, he could no longer be prosecuted for the same worldwide conspiracy in the Northern District of Florida. The government could not avoid this result by arguing that the Middle District conspiracy involved the Jacksonville market and the Northern District conspiracy involved the Fort Walton Beach market. The reason for this is simple-The Middle District indictment *did not charge* a conspiracy involving the Jacksonville market and the Northern District indictment *did not charge* a conspiracy involving the Fort Walton Beach market. It was for that reason that the district court rejected the government's argument that there were two separate conspiracies as the district court held that "[the government] didn't charge that." (R3-19).

The fact that the Eleventh Circuit erroneously considered evidence beyond the four corners of the indictments at issue in considering the defendant's double

jeopardy motion is evident from the fact that the lower court's analysis focused on whether the evidence in the two cases established single or multiple conspiracies. *See Passmore*, No. 99-12325, at 16-18; App. 13-17. But the question is not whether the evidence showed single or multiple conspiracies. The question is whether the government *charged* single or multiple conspiracies. To that question, there can be only one answer - the government in both cases *charged* a conspiracy that covered the world. The only way that the government can dispute this fact is to offer evidence that *contradicts* the charges set forth in the two indictments. As such, the defendant's double jeopardy rights were violated as he was *charged and tried* twice for a worldwide conspiracy.

In this regard, the Eleventh Circuit's decision is in direct conflict with a decision of the Fifth Circuit - *United States v. Atkins*, 834 F.2d 426 (5th Cir. 1987), *overruled on other grounds*, 933 F.2d 325 (5th Cir. 1991). *Atkins* held that "If the face of the indictments clearly prove a double jeopardy violation under the ... five-factor test, of course, a court has no reason to resort to any other evidence." *Id.* at 440. Thus, *Atkins* establishes that a court must first determine if the face of the indictments establish a double jeopardy violation before it can consider any other evidence. In making this decision, the *Atkins* court explored the danger of double jeopardy problems in conspiracy cases. The court stated that:

> As our cases demonstrate, our concern is caused by the freedom which the government

has in drafting an indictment. (footnote and citations omitted). Through the years, we have seen this freedom manifest itself in indictments which vaguely refer to agreements "beginning on or before" or "continuing from" a certain time, made in one or two named jurisdictions and "elsewhere," between the person indicted and "other persons to the grand jury known or unknown." Although we understand the importance, from both the government's and society's perspective, of permitting broad indictments, we also recognize the dangers of such indictments. As the Fourth Circuit eloquently explained:

> Blanket charges of "continuing" conspiracy with named defendants and with "other persons to the grand jurors unknown" fulfil [sic] a useful purpose in the prosecution of crime, but they must not be used in such a way as to contravene constitutional guaranties. If the government sees fit to send an indictment in this general form charging a continuing conspiracy for a period of time, it must do so with the

> understanding that upon conviction or acquittal further prosecution of that conspiracy during the period charged is barred, and that this result cannot be avoided by charging the conspiracy to have been formed in another district where overt acts in furtherance of it were committed, or by charging additional objects or the violation of additional statutes as within its purview, if in fact the second indictment involves substantially the same conspiracy as the first....The constitutional provision against double jeopardy may not be thus nullified by the mere forms of criminal pleading.
>
> *Short v. United States*, 91 F.2d 614, 624 (4th Cir. 1937); *accord Broce*, 781 F.2d at 799, 804 (McKay, J., concurring) (Seymour, J., concurring in part and dissenting in part).

Id. at 439.

Atkins is crucial to understanding the proper application of the double jeopardy clause in this case. Here,

it is undisputed that the government decided to prosecute the defendant in the Middle District for a conspiracy that as the district court found "essentially cover[ed] the rest of the world." (R3-28-29). Applying the reasoning of *Atkins* to this case, the government, having decided to prosecute the defendant for a conspiracy that covered the world, cannot now seek to prosecute him again by arguing that the Middle District case involved a Jacksonville conspiracy and the Northern District case involved a Fort Walton Beach conspiracy. The government simply did not charge that in its indictments. In fact, this case is an even stronger case than *Atkins* because here the government did not even try to change the indictments to charge different conspiracies. Instead, the government charged the same worldwide conspiracy in both indictments and then tried to argue that there were two separate conspiracies involving a Jacksonville market and a Fort Walton Beach market based upon the facts of each case.

Simply put, the government must be held to the charges it alleged in its indictments. When the government charges a conspiracy that covers the world, it cannot later claim that the evidence really shows that there was a Jacksonville conspiracy and a Fort Walton Beach conspiracy. Fundamental notions of fairness and due process require that the government must be held to the charges set forth in the indictments it drafted. *See Atkins*, 834 F.2d at 439. To allow the government to escape the consequences of the decisions it made in drafting its indictments is to permit the government to engage in behavior that is similar to a bait and switch tactic. It improperly allows the government to

try a defendant for conspiracies that it did not charge. This tactic is particularly improper when a defendant has plead guilty to a single large conspiracy and then faces an effort by the government to try him for an allegedly smaller separate conspiracy which was covered in an earlier case. The government must be held to the charges set forth in its indictments and it cannot avoid them by arguing that the facts show that there were actually two separate conspiracies rather than the single conspiracy charged in its indictments.

CONCLUSION

For the reasons expressed above, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully Submitted,

Ellis Stuart Rubin, Esquire
COUNSEL OF RECORD
Rubin & Rubin, P.A.
333 Northeast 23rd Street
Miami, Florida 33137
(305) 576-5600-Direct Line
(305) 576-3292-Telefax

Terry D. Bork, Esq.
Law Offices of Terry D. Bork
2107 Hendricks Avenue
Jacksonville, Florida 32207
(904) 359-0234-Telephone
(904) 396-6100-Telefax
and
I. Mark Rubin, Esq.
Rubin & Rubin, P.A.
2107 Hendricks Avenue
Jacksonville, Florida 32207
(904) 396-7711-Telephone
(904) 396-6100-Telefax
Counsel for Petitioner

June 2000